Nos. 82-1331 and 82-1352

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

LOUISIANA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT AMERICAN TELEPHONE AND TELEGRAPH COMPANY

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Does the Federal Communications Commission have authority to preempt state regulation of telephone equipment, used interchangeably both for interstate and intrastate communication, insofar as state regulation would interfere with the FCC's lawfully adopted regulatory policies.*

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*Affiliates of American Telephone and Telegraph Company are Cincinnati Bell, Inc., Southern New England Telephone Company, and Cuban American Telephone Company. AT&T has no parent company and no other subsidiary or affiliate except ones that are, directly or indirectly, wholly owned by AT&T.

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Respondent American Telephone and Telegraph Company submits this brief in opposition to the petitions for certiorari.[1]

STATEMENT

Petitioners seek review of the Federal Communications Commission's decision in the *Computer II* inquiry,[2]

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[1] Petitioner in No. 82-1331 is the Louisiana Public Service Commission; petitioners in No. 82-1352 are the National Association of Regulatory Commissions, California, and its utility commission.

[2] *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 72 F.C.C.2d 358 (1979) (tentative decision), 77 F.C.C.2d 384 (final decision), 84 F.C.C.2d 50 (1980) (decision on reconsideration), 88 F.C.C.2d 512 (1981) (decision on further reconsideration), *aff'd sub nom. Computer & Communications Industry Ass'n* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982).

a lengthy proceeding in which the FCC reexamined its policies respecting telecommunication, related data processing activities, and customer premises equipment ("CPE") used in telecommunication.[3] The petitions challenge a single aspect of the FCC's multifaceted *Computer II* decision, namely, its preemption of state regulatory authority insofar as state regulation would interfere with FCC policies for CPE used interchangeably in interstate and intrastate communications. This limited preemption was a reasonable exercise of the FCC's authority over interstate communication and is amply supported by judicial precedent; no conflict exists among the circuits or with any decision of this Court; and there is no reason for review on certiorari.

A. Pertinent Background

The *Computer II* decision—at issue in this case—superseded the FCC's earlier attempt, in *Computer I*,[4] to establish a framework for regulating common carrier services related to data processing. Title II of the Communications Act of 1934 provides for comprehensive regulation by the FCC of interstate communication provided on a "common carrier" basis; and it permits, but does not require, more flexible regulation under Title I of other interstate communication.[5] In *Computer I*,

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[3] CPE includes telephone and related equipment located on the customer's premises, ranging from ordinary telephones to complex PBX switchboards and data transmission devices.

[4] *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, 28 F.C.C.2d 291 (1970) (tentative decision), 28 F.C.C.2d 267 (1971) (final decision), *aff'd in part sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973).

[5] Title I comprises provisions 47 U.S.C. §§ 151-55, and Title II comprises §§ 201-24.

responding to the interdependence between communication and computers that had developed by the 1960's, the FCC adopted final rules in 1971 for deciding which computer uses by common carriers it would consider common carrier communication subject to Title II and which it would regard as data processing services not subject to regulation.[6]

During the same period, the FCC in the 1960's "embarked on a conscious policy of promoting competition" (77 F.C.C.2d at 439) in the market for CPE. Such equipment is, almost without exception, used interchangeably for *both* interstate and intrastate communications. Such "dual use" equipment was therefore regulated in various facets by both federal and state agencies. Prior to 1968, CPE was normally provided solely by common carriers, and charges for it were included in tariffs filed with the FCC or state commissions.

This pattern was permanently altered following the FCC's 1968 *Carterfone* decision.[7] Tariff changes made by the carriers after *Carterfone* opened the CPE market to independent, non-common carrier manufacturers and suppliers. Subsequently, in successive decisions reviewed in the Fourth Circuit, the FCC ruled first that the states could not restrict connection of customer-supplied CPE in conflict with carrier tariffs that were consistent

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[6] Under the Communications Act, a common carrier is free to provide services, whether communication or otherwise, that do not constitute common carrier offerings.

[7] *In re Carterfone*, 13 F.C.C.2d 420, *reconsid. denied*, 14 F.C.C.2d 571 (1968). The FCC's decision in *Carterfone* did not deal with telephone instruments and other facilities furnished by telephone companies in providing telephone service. *Id.* at 572.

with the FCC's new policy of fostering CPE competition,[8] and thereafter the FCC adopted technical registration requirements for CPE that preempted any contrary state regulations.[9] In sustaining the FCC's preemptive authority, the Fourth Circuit emphasized "*the impossibility of separating interstate terminal equipment from local terminal equipment* [because] . . . the same telephones are used for both interstate and local communications."[10] This Court denied petitions for certiorari in both cases.

During the 1970's, as the market for providing CPE became increasingly competitive, the nature of CPE also evolved due to technological developments. CPE still included the ordinary telephone, now obtainable from numerous competing suppliers, but it also came to embrace a great range of complex equipment located on customer premises, including highly sophisticated systems that utilize computer capability to provide communication service. Thus, by the mid-1970's, the original dividing line between regulated communication and unregulated data processing had become hopelessly blurred,[11] and CPE had become a competitive business rather than the preserve of common carriers.

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[8] *In re Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utils. Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) *(North Carolina I)*.

[9] *Interstate and Foreign MTS and WATS*, 56 F.C.C.2d 593 (1975), *clarified*, 59 F.C.C.2d 83 (1976), *aff'd sub nom. North Carolina Utils. Comm'n* v. *FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) *(North Carolina II)*.

[10] *North Carolina II*, 552 F.2d at 1043 (emphasis added), discussing *North Carolina I*.

[11] An example is provided by the Dataspeed 40/4[R] device, an item of CPE at issue in *IBM* v. *FCC*, 570 F.2d 452 (2d Cir. 1978). That device was a "complex of small machines with the cumulative capacity to send and receive messages from a central computer . . . . [with] enhanced capabilities for storage, correction, and transmission of

B. The Computer II Inquiry

Against this background, the FCC in 1976 began its *Computer II* inquiry[12] in order to establish a regulatory program that would respond to the developments in data processing and communication that had overtaken *Computer I*. After five years of proceedings, the final decision in *Computer II* rendered in 1980 resolved a host of policy issues relating to FCC regulation and the terms on which common carriers could participate in data-related communication services and CPE. One aspect of the decision—the treatment of CPE—is alone relevant to this case.[13]

Recognizing that the line it had drawn in 1971 between regulated communication and unregulated data processing was no longer workable, the FCC in *Computer II* established a new regulatory line of demarcation. It determined that the provision of CPE should not be regarded as "common carrier communication" subject to Title II regulation and that the charges imposed for CPE should not be tariffed or "bundled" with charges for "basic" transmission services. Relying on its general jurisdiction over equipment used in interstate communication,[14] the FCC ordered that existing carrier tariffs for

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data. . . ." *Id.* at 454. Years of litigation were consumed in determining whether this device provided a regulated communication service or an unregulated data processing service.

[12] *Notice of Inquiry and Proposed Rulemaking*, 61 F.C.C.2d 103 (1976).

[13] The petitions for certiorari do not challenge the two other major aspects of *Computer II*, namely, the treatment of enhanced services or the requirement that AT&T provide such services and CPE through a separate subsidiary.

[14] As explained at p. 9 below, CPE constitutes "interstate . . . communication by wire" under the Communications Act's definition, which includes "instrumentalities" and "apparatus" "incidental to such transmission." 47 U.S.C. §§ 152(a), 153(a).

CPE be withdrawn from both the FCC and state agencies, so that all manufacturers and suppliers, common carriers or not, could compete on the same basis.

The FCC's decision respecting CPE reflected the increased competition in the CPE market that followed *Carterfone* and related subsequent decisions. 77 F.C.C.2d at 453. The FCC observed that non-carrier providers of CPE (who were never regulated under Title II) were successfully competing with carriers in the now-competitive CPE market:

> "[T]here are hundreds of manufacturers and suppliers of modems, terminals, storage devices, front end processors, large and small central processing units, multiplexers, concentrators, and virtually innumerable related devices. . . . There are multiple vendors for almost any type of equipment desired, and consumers are free to select equipment that best suits their needs." 77 F.C.C.2d at 440.

The FCC found that, if charges for CPE provided by carriers continued to be tariffed and bundled into basic transmission rates, the customer's ability to choose among the large variety of CPE now available would be restricted and rates for interstate transmission services would be affected. It concluded that tariffing of carrier-provided CPE could not be justified:

> "In the present environment in which CPE is marketed, we are hard pressed to proffer any statutory or public interest justification for rate regulation of carrier-provided CPE. . . . [T]he [tariff] regulation of carrier provided CPE has a negative effect on competition and the exercise of our responsibilities over rates consumers pay for interstate communication services." 77 F.C.C.2d at 441.

The FCC determined that, in order to provide consumers with the full benefits of a competitive CPE mar-

ket, carrier CPE should not be tariffed either with the FCC or with the states. The FCC recognized that its new policy meant the preemption of conflicting state regulation, but it held that its actions were authorized by its power over interstate communication, which inevitably would be affected by the tariffing of CPE at the state level. 77 F.C.C.2d at 455-57. On reconsideration, the FCC reaffirmed this conclusion, noting that it was preempting state regulation of CPE "only to the extent that [it] . . . is at odds with the [*Computer II*] regulatory scheme . . . ." 84 F.C.C.2d at 103.

C. The Decision Below

Numerous parties sought review of the FCC's *Computer II* regime, challenging various aspects of the decision. On November 12, 1982, the District of Columbia Circuit upheld the FCC's decision in every respect, finding that it was a reasonable exercise of the FCC's authority within the scope of its power under the Communications Act. 693 F.2d 198. The court held that the FCC's decision that CPE is not common carrier communication subject to Title II regulation was "clearly supported." *Id.* at 210. The agency's decision to require that carrier CPE be unbundled and that CPE be detariffed was also held both reasonable and supported by the record. *Id.* at 211-13. The court approved without qualification the necessary result of these decisions—the preemption of state authority over CPE rates:

> "The [FCC] asserts that preemption of state regulation is justified in this case because the objectives of the *Computer II* scheme would be frustrated by state tariffing of CPE. We agree. Courts have consistently held that when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting

state regulations must necessarily yield to the federal regulatory scheme." LPSC Pet. A-35 (693 F.2d at 214) (footnotes omitted).

Several of the many parties who participated in *Computer II* requested but were denied stays of the FCC's decision at different times. Implementation of the *Computer II* regime according to a schedule established by the FCC began in July 1980, when carriers became free to offer new CPE on a non-tariff basis. Effective January 1, 1983, carriers were required to offer new CPE on a non-tariff basis. Finally, "embedded" CPE (actually in service or in inventory on January 1, 1983), will have to be offered on a non-tariff basis after the FCC decides ancillary questions regarding conditions of transfer and other details.

REASONS FOR DENYING THE WRIT

The FCC permissibly established a new regulatory policy for dual-use CPE to promote the public interest through competition in the CPE market, and it lawfully prohibited state interference with that policy. Numerous cases sustain the FCC's jurisdiction over interstate communication service and facilities, its long-standing policy of introducing competition into the CPE market, and its preemptive authority with respect to dual-use CPE. There is no conflict between the circuits or with any decision of this Court and no other reason for further review in this case.

I. The Commission Acted Rationally and Within the Scope of Its Statutory Authority.

In determining whether a federal agency has properly preempted conflicting state law, the central question is whether the agency has acted "within the scope of [its] delegated authority." *Fidelity Federal Savings and Loan*

Ass'n v. *de la Cuesta*, 102 S. Ct. 3014, 3023 (1982). The FCC's action clearly meets this test. The CPE affected by the FCC's preemption decision in this case is admittedly dual-use CPE which is used in interstate, as well as intrastate, communication. It therefore unquestionably falls within the FCC's broad jurisdiction over "all interstate . . . communication by wire" (47 U.S.C. § 152(a)), including "all instrumentalities, facilities, apparatus, and services . . . incidental to" such communication. 47 U.S.C. § 153(a).

Consistent with this grant of authority, the FCC has been regulating dual-use CPE since at least 1947, when it adopted rules for the connection of recording devices to telephone sets.[15] The FCC has issued decisions affecting a variety of CPE used indiscriminately in both interstate and intrastate communications, including telephones in general,[16] privacy devices attached to telephones,[17] private exchange facilities,[18] teletypewriter exchange service stations and supplemental equipment,[19] and circuit restoration devices.[20]

The FCC's regulation of dual-use CPE was not seriously challenged in the courts until the mid-1970's, when the FCC established its registration program for CPE. At that time, the Fourth Circuit, in two related opinions that

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[15] *In re Use of Recording Devices*, 11 F.C.C. 1033, 1046-48 (1947).

[16] *Katz* v. *AT&T*, 43 F.C.C. 1328, 1332 (1953).

[17] *Hush-A-Phone Corp.* v. *AT&T*, 22 F.C.C. 112 (1957).

[18] *AT&T-Railroad Interconnections*, 32 F.C.C. 337, 339 (1962).

[19] *AT&T-TWX*, 38 F.C.C. 1127, 1133 (1965).

[20] *Dept. of Defense* v. *General Telephone Co.*, 38 F.C.C.2d 803 (1973), *rev. denied*, FCC No. 73-854, *aff'd per curiam sub nom. St. Joseph Tel. & Tel. Co.* v. *FCC*, 505 F.2d 476 (D.C. Cir. 1974).

this Court declined to review,[21] firmly endorsed the FCC's authority. The First, Second and District of Columbia Circuits followed suit, confirming the FCC's authority over a variety of dual-use CPE or other dual-use facilities.[22] There is no conflicting decision in any circuit or in this Court.

In *Computer II* the FCC exercised its established authority to promote the public interest through increased competition. The FCC's policy of fostering competition in the CPE market is also a well established one that has been repeatedly upheld by the courts. Pertinently, it was implemented by the FCC's 1975 decision establishing federal registration requirements for CPE—a decision that the Fourth Circuit affirmed and this Court declined to review.[23] The regulatory decisions respecting CPE made in *Computer II* are simply another iteration of this basic policy.

The encouragement of competition in CPE is part of a broader FCC policy to promote the public interest through competition in various aspects of communications, a policy this Court has held may be pursued whenever the FCC finds that competition is "reasonably feasible" and "in the public interest." *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 94-96 (1953). Based on

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[21] *North Carolina Utils. Comm'n* v. *FCC*, *supra*, 552 F.2d 1036; *North Carolina Utils. Comm'n* v. *FCC*, *supra*, 537 F.2d 787.

[22] *New York Telephone Co.* v. *FCC*, 631 F.2d 1059 (2d Cir. 1980); *California* v. *FCC*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978); *Puerto Rico Telephone Co.* v. *FCC*, 553 F.2d 694 (1st Cir. 1977).

[23] *Interstate and Foreign MTS and WATS*, 56 F.C.C.2d 593, *supra*, *clarified*, 59 F.C.C.2d 83, *aff'd sub nom. North Carolina Utils. Comm'n* v. *FCC*, *supra*, 552 F.2d 1036.

findings of public benefit, the FCC has implemented its competitive policy not only for CPE but also for intercity voice and data communications services. In the intercity area, its actions were explicitly approved by the Ninth Circuit, in a decision this Court declined to review, and also by the Third and District of Columbia Circuits.[24]

Because dual-use CPE falls within FCC jurisdiction and the FCC's *Computer II* policy is rational, conflicting state regulation must give way under the Supremacy Clause of the Constitution. The FCC has well-established power to preempt state regulations that conflict with its own authorized regulatory policies for interstate communication. The FCC's power over dual-use CPE has been approved by every court of appeals that has considered it, and this Court has repeatedly declined to review such decisions.

The FCC's authority to preempt state authority over dual-use CPE was elaborately examined and affirmed in two Fourth Circuit decisions rendered in 1976 and 1977 *(North Carolina I* and *II)*, and in both cases this Court denied certiorari. See p. 4, above. The Fourth Circuit's conclusion was subsequently followed by the First, Second and District of Columbia Circuits in decisions relating to the regulation of a variety of specific types of CPE or other communication facilities.[25]

The specific exercise of the FCC's preemption power in this case was clearly proper. The FCC reasonably found

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[24] *Washington Utils. & Transp. Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975); *Bell Telephone Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975); *AT&T* v. *FCC*, 539 F.2d 767 (D.C. Cir. 1976).

[25] *E.g.*, *Puerto Rico Telephone Co.* v. *FCC*, *supra*, 553 F.2d 694; *New York Telephone Co.* v. *FCC*, *supra*, 631 F.2d 1059; *California* v. *FCC*, *supra*, 567 F.2d 84.

that state tariffing of dual-use CPE would conflict with its policy of promoting customer choice in CPE: the interstate and intrastate uses of CPE cannot practically be distinguished, and a single regime was necessary unless consumers were to buy separate CPE for use solely in intrastate communications. 77 F.C.C.2d at 455-57 & n.74; 84 F.C.C.2d at 103-04. Finally, the FCC emphasized that:

> "[W]e preempt the states here only to the extent that their terminal equipment regulation is at odds with the regulatory scheme set forth [in *Computer II*]. We do not assess here the legality under the Communications Act of future attempts by the states to regulate CPE in ways which they perceive to be consistent with this decision." 84 F.C.C.2d at 103.

II. The Decision Below Presents No Conflict and No Novel Issue.

The FCC's authority to preempt conflicting state regulation of dual-use CPE in the interest of promoting competition in the CPE market presents no conflicts among the circuits and no novel issues of law for this Court. The petitioners seek review of a question that has been examined in detail by four courts of appeals and uniformly resolved in favor of the FCC. Review would be justified only if this Court were prepared to reverse 15 years of agency practice and judicial decisions that, in response to changing technology, have revolutionized the telecommunications industry.

The legal arguments that petitioners urge were laid to rest over five years ago, when this Court twice declined to review the Fourth Circuit decision in *North Carolina I* and *II*. The issue arises because the Communications Act, while giving the FCC broad jurisdiction in Section 2(a), 47 U.S.C. § 152(a), over "all interstate and foreign communication by wire," reserves to the states in Section 2(b),

47 U.S.C. § 152(b), certain powers over instrumentalities used in intrastate communication. Section 2(b) states:

> "[N]othing in this chapter shall be construed . . . to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ."

Petitioners argue that this provision precludes FCC jurisdiction over the rates for CPE used jointly in interstate and intrastate communication—a reading that would effectively deprive the FCC of power over dual-use CPE whenever (as here) it is not practicable to regulate separately its intrastate and interstate uses.

Contrary to petitioners' argument, the courts have consistently adopted the view that when services or facilities fall within the federal ambit of Section 2(a), but also have intrastate uses, the FCC's regulatory authority is preeminent over that of the states. The courts similarly have rejected petitioners' reading of Section 2(b). In *North Carolina I*, the Fourth Circuit explicitly found that Section 2(b) only deprived the FCC of jurisdiction "over local services, facilities and disputes that . . . are *separable from and do not substantially affect* the conduct or development of interstate communications," 537 F.2d at 793 (emphasis added), and the court specifically rejected the notion that "section 2(b) sanctions any state regulation . . . that in effect encroaches substantially upon the [FCC's] authority . . . ." *Id.* This decision was reaffirmed in *North Carolina II:*

> "*North Carolina I* correctly reasoned that if section 2(b)(1) were construed to give the states primary authority over joint terminal equipment, *i.e.*, equipment used interchangeably for interstate and intrastate service, then—whenever state regulations

> conflicted with federal rules applicable to interstate calls—the FCC would necessarily be prevented from discharging its statutory duty under sections 1 and 2(a) to regulate interstate communication." 552 F.2d at 1045.

This Court denied certiorari in both *North Carolina* cases, and the *North Carolina* construction of Sections 2(a) and 2(b) has subsequently been followed by the First, Second and District of Columbia Circuits. See p. 10, above.

A decade of FCC regulation is premised upon this uniform construction of Sections 2(a) and 2(b). An entire new and competitive CPE industry now rests upon the FCC's preemptive authority, exercised in the registration program and now in the *Computer II* decision. Successive circuit court decisions have reinforced rather than questioned the Fourth Circuit's reading. At this stage, any revamping of the statutory plan should come from Congress and not through judicial disturbance of a settled construction.

NARUC mistakenly suggests that the *North Carolina* cases can be distinguished because the states' ratemaking authority is affected in this case. But Sections 2(a) and 2(b) speak of "rates" and "facilities" in precisely the same terms and do not restrict FCC preemptive power as to the former any more than as to the latter. Indeed, state rate tariffs were directly affected by the FCC action upheld in *North Carolina II*.[25] A parallel argument, seeking to distinguish "services" from "facilities," was explicitly rejected by the District of Columbia Circuit in

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[25] That decision compelled the telephone companies to make their state-filed protective connecting arrangement tariffs inapplicable to registered CPE.

California v. *FCC*, after which this Court again denied certiorari. See p. 10, above. Finally, in the *New York Telephone* case, the Second Circuit sustained FCC preemptive authority as applied in a case that unquestionably involved state rate regulation. See 631 F.2d at 1061.

Taking a different tack, the Louisiana Public Service Commission suggests that preemption by a federal agency is somehow more suspect than preemption by Congress, and that an agency cannot preempt state regulations in furtherance of policies not imposed by statute.[27] But this argument was disposed of by this Court at least twenty years ago, in *United States* v. *Shimer*, 367 U.S. 374, 381-82 (1961), and again only last term in *de la Cuesta*,[28] when the Court reaffirmed the power of agencies to preempt state law through regulations:

> "Federal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. *United States* v. *Shimer*, 367 U.S. 374, 381-82 (1961).
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> A pre-emptive regulation's force does not depend on express congressional authorization to displace state law; moreover, whether the administrator failed to exercise an option to promulgate regulations

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[27] The argument appears to be that the decision to detariff CPE is part of a "self-generated" policy of "deregulation" that is not expressed in the Communications Act and that therefore cannot be imposed on the states through preemption, because "an express or implied Congressional directive is necessary for the preemption of state law." LPSC Pet. 17-18.

[28] *Fidelity Federal Savings and Loan Ass'n* v. *de la Cuesta*, *supra*, 102 S. Ct. 3014. Accord, *Blum* v. *Bacon*, 102 S.Ct. 2355 (1982).

> which did not disturb state law is not dispositive." 102 S.Ct. at 3022-23.

This Court expressly held that the only questions to be considered when state regulation appears to conflict with federal agency regulation are whether the agency meant to preempt state law and, if so, whether preemption was "within the scope of [the agency's] delegated authority." *Id.* at 3023.

In *de la Cuesta*, the Court held that a Federal Home Loan Bank Board regulation permitting use of "due-on-sale" clauses in mortgage contracts written by federal savings and loan associations preempted contrary state law. The Board's enabling statute, like the Communications Act, contained a general grant of authority, and the Board, like the FCC here, had made clear its intent that the regulation preempt any contrary state law. Yet, while the Communications Act explicitly gives the FCC power over "charges" for equipment used in interstate communications, the Board's statute made no mention of due-on-sale clauses. Because the FCC's action here rests on an even sounder footing, this Court's approval of the Board's preemptive action effectively disposes of LPSC's argument.

Over a decade ago, Chief Justice Burger, then a circuit judge, rejected a different attempt to use Section 2(b) to frustrate effective FCC regulation of CATV, observing:

> "Any other determination would tend to fragment the regulation of a communications activity which cannot be regulated on any realistic basis except by a central authority; fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication."[29]

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[29] *General Telephone Co. of California* v. *FCC*, 413 F.2d 390, 401 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

Those words apply with even greater force to the regulation of CPE used interchangeably for interstate and intrastate communication. They resolve this case.

CONCLUSION

For the reasons stated, the petitions for certiorari should be denied.

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